NO.

JUN 19 1990

JOSEPH F. SPANIOL, JR.
CLERK

In the
Supreme Court of the United States

OCTOBER TERM, 1989

ESTELLA HAYNES ROBINSON, ADMINISTRATRIX OF THE ESTATE OF WILLIE ROBINSON, JR., AND THE REPRESENTATIVE OF THE WRONGFUL DEATH BENEFICIARIES OF WILLIE ROBINSON, JR.; COMMILLA PERKINS AS REPRESENTATIVE OF THE HEIRS AT LAW OF PATRICIA ANN PERKINS, DECEASED; DEBRA ANN JOHNSON, A MINOR BY AND THROUGH JOHNNIE MAE JOHNSON, HER MOTHER AND NEXT FRIEND; AND DETRICK GRANBERRY, A MINOR BY HIS FATHER AND NEXT FRIEND, ALONZO GRANDBERRY, AS REPRESENTATIVE OF THE WRONGFUL DEATH BENEFICIARIES OF SHALANDA GRANBERRY

Petitioners

v.

MTD PRODUCTS, INC., AND HENRY M. BUMP

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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1. QUESTIONS PRESENTED

The questions presented by this petition are:

(1) Should Pre-trial Orders, pursuant to Rule 16 of the Federal Rules of Civil Procedure, be construed narrowly to preclude issues which are inherent in the language of the Order and no surprise to opposing counsel, or should they be broadly construed to include such issues for a complete adjudication?

(2) Can a Federal Highway Administration Regulation which requires a truck driver to wear a seat belt be used as the basis of a negligence per se instruction when a truck driver fails to wear the seat belt, is jarred out of his seat in an accident, and hits a car full of people on the opposite side of the road?

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ESTELLA HAYNES ROBINSON,
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OF WILLIE ROBINSON, JR., AND
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Petitioners

v.

MTD PRODUCTS, INC., AND HENRY M. BUMP
Respondents

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

OPINIONS BELOW

By judgment on the 21st day of March, 1990, the United States Court of Appeals for the Fifth Circuit denied a petition for rehearing of a decision made on February 22, 1990, affirming a judgment of the United

States District Court for the Northern District of Mississippi, Delta Division, dated February 17, 1988. The opinion of the court of appeals (A-1) is reported at 894 F.2d 758 (5th Cir. 1990). The opinion of the District Court (A-23) is not reported.

JURISDICTION

The decision of the Fifth Circuit Court of Appeals was entered February 22, 1990, and a petition for rehearing was denied on the 21st day of March, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 .

STATUTORY PROVISIONS INVOLVED

The provisions are listed as follows and the text appears in the appendix:

1. Federal Rules of Civil Procedure Rule 16

2. A Federal Motor Carrier Safety Regulation promulgated by the Federal Highway Administration regarding the duty of a truck driver to wear a seat belt is found at 49 C.F.R. § 392.16 (1984).

STATEMENT OF THE CASE

Petitioners are Debra Johnson and the Wrongful Death Beneficiaries of Willie Robinson, Patricia Perkins, and Shalanda Granberry. They filed separate lawsuits alleging negligence against Henry M. Bump and his employer, MTD Products, Inc., as a result of an accident in which, after an initial collision, Mr. Bump's eighteen-wheel tractor trailer rig crossed the center line and collided with Willie Robinson's car. Federal Jurisdiction was based upon diversity of citizenship. The cases were consolidated for trial.

The evidence at trial showed that this accident was a multi-vehicle accident, which occurred on a two-lane U.S. highway known as Highway 61. A northbound eighteen-wheeler driven by Henry M. Bump was struck by a southbound car driven by a Willis Harris. There was evidence to the effect that Mr. Bump was knocked from his seat, not wearing a seat

belt, and was no longer able to control his truck, which went into the southbound lane of travel, striking the Robinson car, killing three people and causing permanent brain damage to Debra Johnson. Soon after the accident, Mr. Bump told the trooper investigating the accident that he was thrown out of position in the first collision. (Trial Transcript p. 468) Indeed, the evidence proved that 2.4 seconds passed between the Harris collision and the Robinson collision with no braking by Mr. Bump. (T. 1523) However, at trial, Mr. Bump denied being thrown from his seat in the collision with the Harris car. (T. 327) Petitioners contend that if the seat belt had been worn, Mr. Bump would not have lost control of the truck.

The trial court in a preliminary ruling decided that Mr. Bump's failure to wear a seat belt as required by federal regulation would not be the subject of a negligence per se instruction because the seat belt regulation

was not designed to protect other users of the highway but only the driver. The trial court stated another reason for this preliminary ruling was that the issue was not set forth in the contested issues of law in the Pre-trial Order; although the issue was set forth in the concise summary of ultimate facts. (A-29)

At the instruction conference prior to the jury charge, the trial court gave a ruling on the record for his refusal of a negligence per se instruction regarding the failure to use a seat belt and stated specifically that the seat belt law was not designed to protect other users of the highway but only the driver. This ruling at the instruction conference contained no mention of any problems concerning the Pre-trial Order. (A-40)

The Fifth Circuit Court of Appeals affirmed the trial court's decision not to grant a negligence per se instruction based on

the seat belt regulation and grounded the affirmance on a restrictive reading of the Pre-trial Order. The Court ruled that trial judges should be encouraged to interpret Pre-trial Orders narrowly under Rule 16 of the Federal Rules of Civil Procedure. (A-8) Although, the Pre-trial Order contained a "Concise Statement of Facts" portion which set forth that Mr. Bump was not wearing a seat belt and could have been thrown from his seat in the collision with the Harris car and a stipulation that Mr. Bump did not wear his seat belt, the Fifth Circuit Court of Appeals decided that trial judges should be encouraged to interpret Pre-trial Orders narrowly rather than broadly. The court of appeals did not discuss whether the seat belt regulation was designed to protect other users of the highway. The regulatory history was extremely clear that the regulation <u>was designed</u> to protect other users, and petitioners received no serious challenge from the respondents on

this issue at the appellate level. Also, the court of appeals did not discuss the admission of defense counsel that the issue was no surprise. (A-43)

REASONS FOR GRANTING CERTIORARI

I.

THE MAJORITY OF THE CIRCUITS AND THE COMMENTATORS SUPPORT A BROAD CONSTRUCTION OF PRETRIAL ORDERS

This case involves a serious misinterpretation of the Federal Rules of Civil Procedure by the Fifth Circuit Court of Appeals, which is in direct conflict with those in the First, Six, and Tenth Circuit Courts of Appeals. The Fifth Circuit holds that Rule 16 requires that Pre-trial Orders should be narrowly construed, where the other circuits have held that the Pre-trial Order should be broadly and liberally construed in order that all of the issues inherent in the language of the Pre-trial Order can be adjudicated. Petitioners urge this Court to settle this conflict between the Circuits and

to decide that Pre-trial Orders pursuant to Rule 16 should be interpreted broadly. This position is supported by the majority of the Circuits and by both Professors Moore and Wright.

In addition, the interpretation of the seat belt regulation is an issue of national significance and of importance to millions of drivers and passengers on the United States highways. The history of the Federal Motor Carrier Safety Regulation which requires truck drivers to wear their seat belts explicitly and clearly demonstrates that this regulation was designed to protect other users of the highway and to enhance the truck driver's ability to control his vehicle in crash situations. A decision on this issue could reduce the deaths and injuries on the highways under circumstances similar to those in this case.

The pre-trial conference took place February 4, 1986, two years prior to trial.

Petitioners in the Plaintiffs' "Concise Summary Of Ultimate Facts" part of the Pre-trial Order set out in detail that Mr. Bump may have been thrown from the seat in the Harris collision because of his failure to wear a seat belt:

> Mr. Bump failed to slow or stop the truck safely. The only skid marks of the truck North of the place where the collision with the Harris automobile occurred are front wheel tractor brakes. Mr. Bump should have been able to apply his brakes and stop before the collision with the Robinson automobile, but was unable to do so. It appears that he either did not fully apply the brakes, fearing a jack-knife, or not wearing seat belts, was thrown out of position in the collision with the Harris automobile. (Emphasis added.)
>
> ....
>
> Mr. Bump was not wearing seat belts and hit his head on the roof, cutting it so that forty stitches were required, in one of the collisions. (A-45)

The Pre-trial Order in "Facts Established By Stipulation Or Admission" states:

Mr. Bump was not wearing seat belts.*

*Relevancy and admissibility are not admitted by MTD or Bump. MTD and Bump reserve the right to explain stipulation number 49 to the jury. Objection is made on the basis of Rule 403.

(R.375)

The only issue that the parties viewed as "contested" and "of law" was independent intervening cause referred in the Section of the Pre-trial Order on "Contested Issues Of Law." The Pre-trial Order did not set out any statutes of the State of Mississippi, such as statutes regarding operating at 55 miles per hour and remaining on the right hand side of the road. Petitioners treated the seat belt regulation in the same manner. (A-52)

The seat belt issue was no surprise to the respondents (defendants). The Defendants, Bump and MTD, addressed the seat belt issue in a Motion in Limine filed with the Court seven (7) days prior to the February 1st, 1988 trial. The Motion, which surprisingly narrows even further this particular issue, raises

several seat belt issues, including their position that the failure to wear seat belts is not evidence of negligence.

(A-53)

The trial court's initial ruling on the seat belt issue was as follows:

> In the Court's opinion, this CFR concerning seat belts was enacted for the purpose of protecting the wearer of the seat belt, the driver of the vehicle. It is the Court's opinion that the evidence that the Defendant Bump's truck was equipped with a seat belt assembly and that it was not being worn or utilized on the occasion complained of should come in just as the evidence came in in the Hinson case that the driver of the car was parked on the wrong side of the street. In no event should this evidence form the basis of a negligence per se instruction and in no event should the provisions of the Code of Federal Regulation provision come before this jury. The Court is of this opinion, number one, in that the Pre-trial Order in this case does not under the Section entitled "Questions of Law," the Code of Federal Regulation provision is not mentioned, the seat belt is not mentioned, the issue was not preserved. It's not preserved anywhere in the Pre-trial Order in any mixed question of law and fact. In fact, the CFR provision is not mentioned in the Pre-trial Order. The Court is of the opinion that you cannot interject questions of law at

> this late stage in this proceeding. Number two, the plaintiff has not shown that the plaintiffs in the case sub judice are members of any protected class envisioned by the enactment of the regulation and that the resulting harm is of the type sought to be prevented by passage of the regulation.

(A-29)

At the instruction conference, the trial judge made no mention of any problem concerning the Pre-trial Order and only stated that the regulation was designed only to protect the truck driver:

> Pursuant to the pronouncement of the Mississippi Supreme Court in Haver v. Hinson, 385 So. 2d, page 605, Mississippi, 1980, wherein the Court held that the violation of a safety regulation or statute constitutes negligence per se only where the plaintiff is a member of the class sought to be protected by the statute and the resulting harm is the type sought to be prevented by the passage of the statute or regulation would the failure to utilize this equipment constitute negligence per se. Therefore, the Court is not and will not give a negligence per se instruction on the issue of Mr. Bump's failure to wear a seat belt.

(A-40)

In the case at bar, the court of appeals supports its narrow interpretation of the Pre-trial Order with a prior Fifth Circuit decision, Flannery vs. Carroll, 676 F. 2d 126, 129 (5th Cir. 1982). The Court in the Flannery case stated as follows:

> District Courts are encouraged to construe Pre-trial Orders narrowly, without fear of reversal. Hodges, 597 F.2d at 1014.

Flannery vs. Carroll, 676 F.2d 126 (5th Cir. 1982).

The Fifth Circuit has adopted the narrow construction rule and has taken it to a new extreme in the case at bar. This construction of Rule 16 of the Federal Rules of Civil Procedure is in direct conflict with the entire spirit of the Rules of Civil Procedure. The majority of the other Circuits have ruled that Pre-trial Orders should be liberally and broadly construed to include all issues which

are inherent in the language of the Pre-trial Order. The Fifth Circuit has not followed the other Circuits.

Rule 16 reads in pertinent part as follows:

> .... (c) **Subjects to be discussed at Pre-trial conferences.** The participants at any conference under this rule may consider and take action with respect to (1) the formulation and simplification of the issues, including the elimination of frivolous claims or defenses;
>
> .... (3) the possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof, stipulations regarding the authenticity of documents,and advance rulings from the court on the admissibility of evidence;
>
> (8) the form and substance of the pretrial order;
>
> ....(e) **Pretrial Orders.** After any conference held pursuant to this rule, an order shall be entered reciting the action taken. This order shall control the subsequent course of the action unless modified by a subsequent order. The order following a final pretrial conference shall be modified only to prevent manifest injustice.

Fed. R. Civ. P. 16.

In the case of Hodges vs. United States, 597 F.2d 1014 (5th Cir. 1979), the Fifth Circuit discussed Rule 16:

> Rule 16, Fed.R.Civ.P., establishes a mechanism whereby the trial court can expedite the just disposition of cases and reduce the costs of litigation. This mechanism consists of a pretrial conference and a resulting order. The pretrial conference is designed to restrict the scope of the trial by defining and therefore limiting the issues involved.

Id at 1017.

Each case of the Fifth Circuit seems to push further and further into requirement of a narrow construction. Professor Moore in his treatise has noted the split in the Circuits on this issue:

> When interpretation of a pretrial order is necessary, the court should not follow an inflexible approach; pretrial orders should be liberally construed. There is, however, contrary authority.

3 J. Moore, Moore's Federal Practice ¶16.19 pp. 16-77, through 16-78 (2d ed. 1989).

Professor Moore cites the Flannery v. Carroll-case as the example of contrary authority. Other Circuits such as the Tenth Circuit do not adhere to this rule. In the case of Century Refining Company v. Hall, 316 F.2d 15 (10th Cir. 1963), the Tenth Circuit described the Pre-trial Order as a tool to facilitate a trial on the merits which should be construed liberally:

> But, while the Pre-trial Order should measure the dimensions of a lawsuit and govern its course in the absence of some good reason for departure, this does not mean that the order should not be liberally construed to embrace all of the legal and factual theories inherent in the issues defined therein. Any other construction of the Pre-trial Order would tend to unduly constrict the trial of the case and defeat the central and salutary purpose of the Federal Rules of Civil Procedure to insure the trial of every lawsuit on its merits. It is a procedural tool to facilitate the trial of a lawsuit on its merits and not to

> defeat it on a technicality. We must not allow ourselves to construe the Pre-trial Order in the spirit of a common law pleading.

Id. at 19-20.

Professor Wright in his treatise on Federal Civil Procedure concurs in the interpretation of Rule 16 set forth in the Hall case:

> In addition to allowing matter to be introduced that is outside the Pre-trial Order in appropriate cases, courts have held that the order should be construed liberally so that it covers any of the possible legal or factual theories that might be embraced by its language. Even if the pre-trial order cannot be interpreted to apply to the issue that is challenged as being outside its terms, relief still may be available because Rule 16 explicitly provides that the order may be modified to "prevent manifest injustice."

6. C. Wright and A. Miller, Federal Practice and Procedure, §1527, pp. 609-610 (1977).

In the case of Trujillo v. Uniroyal Corp., 608 F. 2d 815 (10th Cir. 1979), the Tenth Circuit again reaffirmed its committment to broadly construing Pre-trial Orders:

> Proper pretrial orders are indeed powerful, but even at their best they should be "liberally construed

> to cover any of the legal or factual theories that might be embraced by their language." Rodrigues v. Ripley Industries, Inc., 507 F.2d 782, 787 (1st Cir. 1974). This court has warned that the pretrial order "is a procedural tool to facilitate the trial of a lawsuit on its merits and not to defeat it on a technicality. We must now allow ourselves to construe the pretrial order in the spirit of a common law pleading." Century Refining Co. v. Hall, 316 F.2d 15, 20 (10th Cir. 1963). The reasons for avoiding overly technical applications of pretrial orders are amplified when, as in this case, the pretrial order is not properly drawn, is not definitive, specific, complete or detailed.

Trujillo v. Uniroyal Corp. 608 F. 2d 815, 818 (10th Cir. 1979).

The Trujillo v. Uniroyal Corp. case is similar to the case at bar. In the Trujillo case the judge refused a specific instruction concerning failure to warn. The case involved the explosion of a tire which was being mounted on a rim. The accident caused serious personal injury. The Pre-trial Order in general terms set out a products liability

claim. At the trial of the case the trial judge refused to give a failure to warn instruction concerning the product.

The case is similar to the one at bar because it was generally alleged by the Petitioners in the Pre-trial Order that Mr. Bump lost control of his vehicle and further they alleged that he may have been thrown from his seat because of his failure to wear seat belts. Futhermore, the Respondents admitted that the issue of seat belts and the failure to wear them was in no way a surprise to them. At a conference with the trial judge during the trial counsel for the respondents admitted on the record the issue was not a surprise:

> THE COURT: Well, we know he's going to testify that he has the fuzz-buster, the seat belts--
>
> ....
>
> MR. DUNBAR: It's a matter for argument, Your Honor, as well as the fact -- correct me if I'm wrong -- I don't think these are issues in the pretrial order.

MR. THOMPSON: Well, it's certainly no surprise to anybody.

MR. DUNBAR: No.
(A-43)

In point of fact, the respondents filed a Motion in Limine stating that there was no obligation to wear seat belts. (A-53) The Trujillo case stands for the proposition that the Pre-trial Order should not be construed in a hyper-technical fashion so as to exclude serious issues which are raised by the language of the Pre-trial Order.

The First Circuit court of appeals adopted the rule to liberally construe pre-trial orders in the case of Rodrigues v. Ripley Industries, Inc., 507 F.2d 782, at 787 (1st Cir. 1974). The First Circuit again reiterated its support of this position in the case of Geremia v. First National Bank of Boston, 653 F.2d 1, at 5 (1st Cir. 1981). The Fourth Circuit adopted the rule of liberal construction of pretrial orders under Rule 16

in the case of Howard v. Kerr Glass Manufacturing Co., 699 F.2d 330, at 333 (6th Cir. 1983). The better rule is that followed by a majority of the circuits and supported by the treatise writers.

II.

THE SEAT BELT REGULATION WAS DESIGNED TO PROTECT OTHER USERS OF THE HIGHWAYS

There can be no doubt that the seat belt regulation was designed to protect other users of the highway as well as the driver of a truck. The history of the regulation is extremely clear and explicit on this point. The Respondents have presented no history or case law that in any way contradicts this point.

The regulation of the Federal Highway Administration regarding the duty of truck drivers to wear seat belts reads as follows:

> A motor vehicle which has a seat belt assembly installed at the driver's seat shall not be driven unless the driver has properly restrained himself with the seat belt assembly.

49 C.F.R. Section No. 392.16 (1984)

The regulatory history in regard to the seat belt law is strikingly plain in its provision that the rule is to protect other users of the highway as well as the driver. In the Notice of Proposed Rule Making, F.C. Turner, the Federal Highway Administrator stated:

> Insuring that the driver will remain in his seat during evasive manuevers and crash situations should decrease the possibility of injury to passengers in commercial vehicles **and to other users of the highways.** (Emphasis added)

34 Fed. Reg. 9999 (1969)

Once again in the Preamble to the issuance of the regulation the design of the law is repeated:

> Intensive research during recent years has **conclusively demonstrated** that the proper use of occupant restraints in motor vehicles produces a marked increase in the safety of occupants **and other highway users.**

> ....Seat belt use by commercial drivers also **promises to improve the driver's control of his vehicle in emergency situations.** These conclusions justify the cost of compliance with the new requirements.
>
> (Emphasis added)

35 Fed. Reg. 10859 (1970).

The regulation is plainly for the benefit of the general driving public as well as for the truck driver. All of the petitioners qualify as members of the general driving public who were enjoying the use of the United States Highway 61 at the time of this devastating accident. The interpretation of this regulation is of extreme national significance. The lives of numerous highway users will be affected.

The Mississippi Supreme Court has ruled that these federal regulations of truck drivers furnish the reasonable man standard and are the proper subject of a negligence per se instruction. In the case of Stong v. Freeman Truck Line, Inc., 456 So.2d 698 (Miss.

1984), the Mississippi Supreme Court interpreted the relation of federal highway safety regulations to Mississippi negligence law:

> The same may be said of the federal regulations. Freeman Truck Lines is a certificated common carrier subject to federal regulation. The Federal Highway Administration and its predecessor in authority, acting well within the scope of the authority vested in them by the Congress, have promulgated a series of highway safety regulations, among which are 49 C.F.R. Section 392.21-392.22. By their terms these regulations apply to this case. They, too, furnish standards of care by which Long's conduct must be judged. See Restatement (Second) of Torts Section 286 (1965) (reasonable man standard may be defined by administrative regulations); Brandes v. Burbank, 613 F.2d 658, 664-65 (7th Cir. 1980) (reasonable man standard defined by reference to federal highway safety regulations); NeSmith v. Bowden, 17 Wash. App. 602, 607-608, 563 P.2d 1322, 1325-1326 (1977) (same).

Stong v. Freeman Truck Line, Inc., 456 So.2d 698, 707 (Miss. 1984).

The Mississippi Supreme Court held in the Stong case that the federal regulations should form the basis of a negligence per se instruction:

> First, in at least two substantive instructions, Nos. 11 and 13, the jury was advised that acts or omissions violative of applicable highway safety standards derived from state statute or federal regulations were merely evidence of negligence and not negligence per se. This was error.

Id. at 704.

In the case at bar, there is no dispute that the Respondent, Mr. Bump, violated the regulation. The only issue would be whether the violation was the proximate cause of the accident. The jury was never able to decide this issue because they were not instructed on Mr. Bump's duty to wear a seat belt.

The opinion of the Court of Appeals does not state whether or not the seat belt law was designed to protect other users of the highway. It could be implied by the absence

of comment that the Court does not believe it was designed to protect other users of the highway. Petitioners respectfully urge that such an implication would be a serious misinterpretation of this law. The regulatory history is extremely straight forward that the rule is intended to include other users of the road. A truck driver who is buckled up will not be thrown from his seat even if the truck is involved in a crash situation. These extremely large and heavy vehicles have been determined to require special regulations. A ruling which accepts other users of the highway as members of the protected class would save lives. It would also provide a meaningful penalty for non-compliance.

CONCLUSION

Petitioners submit the Court should settle the split in the circuits concerning the proper construction Pre-trial Orders pursuant to Rule 16 of the Federal Rules of Civil Procedure. The better rule is that of

the majority of the circuits which requires a broad and liberal construction of Pre-trial Orders to include all issues inherent in the language of the order. This construction is supported by both Professors Moore and Wright. This interpretation is consistent with the spirit and philosophy of the Federal Rules of Civil Procedure. Further, the petitioners urge the court to find that the administrative regulation regarding truck drivers' duty to wear seat belts was designed to protect other users of the highway as well as the truck driver himself. The regulatory history concerning this rule is clear. Such a ruling could save lives in situations similar to the case at bar. The Mississippi Supreme Court's decisions make it clear that if petitioners are a member of the protected class, then the regulation is a proper subject for a negligence per se instruction. This Court should grant certiorari to settle this important split in the circuits. This issue

affects all litigants. Moreover, the interpretation of the seat belt regulation is an issue of national significance.

Respectfully submitted,
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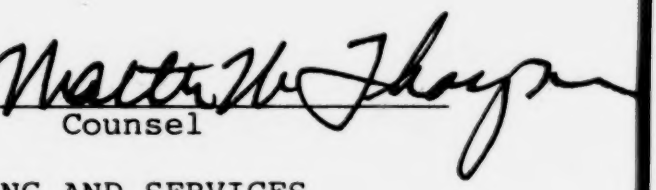
By 
Counsel

PROOF OF FILING AND SERVICES

I, Walter W. Thompson, counsel for Petitioners and a member of the Bar of the Supreme Court of the United States, do hereby certify that on the _____ day of June, 1990, I filed the foregoing petition for writ of certiorari with the Clerk of the Supreme Court of the United States by mailing forty copies of same together with the filing fee in a duly addressed envelope by first class mail with postage thereon prepaid addressed to: Joseph F. Spaniol, Jr., Clerk, Supreme Court of the United States, 1 First Street, Northeast,

Washington, D.C. 20543; and I also served a true copy of the foregoing petition on the Respondents by mailing three copies of same in respective duly addressed envelopes by first class mail with postage thereon prepaid to the following counsel of record:

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_____
Counsel for Petitioners

STATE OF LOUISIANA
PARISH OF _____, TO-WIT:

The foregoing proof of filing and services was subscribed ans sworn to before me

by Walter W. Thompson, this the _____ day of June, 1990.

My Commission expires:

_____

_____
Notary Public

APPENDIX

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1. Federal Rules of Civil Procedure Rule 16 A-55

2. Federal Highway Administration Regulation Dealing with the Duty of Truck Drivers to Wear Seat Belts at 34 C.F.R. §392.16 (1984) A-56

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Estella Hayes ROBINSON,
Administratrix of the Estate
of Willie Robinson, Jr., et al.,
Plaintiffs-Appellants,

v.

Henry M. BUMP, et al.,
Defendants-Appellees.

Alonzo GRANDBERRY, et al.,
Plaintiffs-Appellants,

v.

Henry M. BUMP, et al.,
Defendants-Appellees

Commilla PERKINS, etc.,
Plaintiff-Appellant,

v.

MTD PRODUCTS, INC., et al.,
Defendants-Appellees.

Debra Ann JOHNSON,
Plaintiff-Appellant,

v.

MTD Products, INC., et al.,
Defendants-Appellees.

No. 88-4377.

United States Court of Appeals,
Fifth Circuit.

Feb. 22, 1990
Rehearing and Rehearing En Banc
Denied March 21, 1990

Appeal from the United States District Court
for the Northern District of Mississippi

Argued: November 8, 1989 Decided: February 22, 1990

Before LIVELY,[1] JOLLY AND DUHE', Circuit Judges.

Walter W. Thompson, J. Walker Sims, Clarksdale, Miss., A. T. Tucker, Jr., Tunica, Miss., for plaintiffs-appellants.

Lucius Edwards, Hernando, Miss., for Grandberry.

Johnnie E. Walls, Jr., Greenville, Miss., for Perkins & Johnson.

Jack F. Dunbar, Holcomb, Dunbar, Connell, Chaffin & Willard, Oxford, Miss., Cynthia I. Mitchell, W. Kurt Henke, L. Elizabeth Bufkin, Holcomb, Dunbar, Connell, Chaffin & Willard, Clarksdale, Miss., for MTD Products & Henry Bump.

Robertshaw, Terney & Noble, Philip B. Terney, Greenville, Miss., for Willis Harris.

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[1]Circuit Judge of the Sixth Circuit, sitting by designation.

This is a diversity negligence action brought by the estate and family of Willie Robinson against Willis Harris, MTD Products, and Henry Bump. The Robinsons appeal from a judgment denying relief against MTD and Bump. We affirm.

MTD Products employed Henry Bump to operate an eighteen-wheel tractor-trailer rig. On November 2, 1984, Bump was driving the rig over a bridge in the northbound lane of a two-lane portion of U. S. Highway 61 followed by a small white car and a car driver by Paul Battle, III. North of the rig three cars were closely approaching in the opposing lane and the white car took this opportunity to pass the rig. In response to the action of the white car Dewey Dickins, the driver of the first car in the opposing lane, applied his brakes and permitted the white car to complete its passing maneuver and reenter the northbound lane. Collision was then imminent

between the Dickens car and the car immediately behind it driven by Willis Harris. After applying his brakes Harris lost control of his vehicle, struck the right side of the bridge, and was deflected into the oncoming tractor-trailer in the northbound lane.

Bump testified that when he saw the white car attempting to pass him he applied his brakes and began to skid. He held his foot on the brake until the white car edged into the lane in front of him. He then observed the Harris car strike the bridge rail and come across the center line and strike the left front of his rig. He testified that on impact he was thrown about the cab and did not brake at any time after the collision. He noticed that the impact with the Harris car had affected the streering and that the rig was veering to the left.

Willie Robinson's car was following behind the Harris car. The MTD rig entered the soutbound lane, struck the Robinson car, and dragged it back approximately 185 feet. Robinson and three family members were killed; two other family members were injured. The white car that began the chain of events was never identified.

The jury found that Harris' negligence caused the accident but that Bump was not negligent. The judge entered judgment against Harris and in favor of the estate of Robinson and his family, but denied relief against Bump and MTD.

[1] The parties stipulated that the MTD truck was equipped with seat belts and that Bump was not wearing a seat belt at the time of the accident. A regulation of the Department of Transportation forbids a driver of a truck such as the MTD truck from driving unless he has "properly restrained himself

with the seat belt assembly." 49C.F.R. §392.16 (1988). The appellants submitted two proposed instructions which stated that Bump's failure to use his seat belt constituted negligence as a matter of law and that, if the jury found this failure caused the accident, they were bound to return a verdict against Bump and MTD. The district judge declined to give either instruction because the issue had not been included in the Pretrial Order and because the regulation was solely for the protection of the driver.

The appellants argue that the regulation was intended for the safety of the general public and the district judge erred in refusing the instruction. The appellants also argue that the district court's ruling was based on the substance of the regulation and not appellant's failure to include the issue in the Pretrial Order. The record shows that during the presentation of the plaintiff's

case the judge ruled that the seat belt evidence should not form the basis of a negligence per se instruction:

> The Court is of this opinion, number one, in that the pretrial order in this case does not under the section entitled "Questions of Law," the Code of Federal Regulation provision is not mentioned, the seat belt is not mentioned, the issue was not preserved. It's not preserved anywhere in the pretrial order in any mixed question of law and fact. In fact, the CFR provision is not mentioned in the pretrial order. The Court is of the opinion that you cannot interject questions of law at this late stage in the proceedings.
>
> Number two, the plaintiff has not shown that the plaintiffs in the case sub judice are members of any protected class encisioned by the enactment of the regulation and that the resulting harm is of the type sought to be prevented by passage of the regulation.

When the judge later took up the matter at the charge conference he first noted he had "heretofore ruled on that." He then proceeded

to address only the substance of the proposed instruction and did not again comment on the appellants' failure to incude the issue in the Pretrial Order.

We cannot agree with the appellants that the judge's prior ruling was only preliminary and that the judge somehow implicitly reconsidered his grounds for the ruling. Nothing in the record indicates that the judge reconsidered his ruling. Nor can we agree that the agreed fact in the Pretrial Order that Bump was not wearing a seat belt sufficed to raise the issue of negligence per se when there was no mention of it in the list of contested issues. This Court has declined to force trial judges into overbroad interpretation of pretrial orders because "[s]uch a practice would be inconsistent with the underlying purpose of the pretrial procedure to define and limit the issue for trial." Hodges v. United States, 597 F.2d

1014, 1017 (5th Cir.1979). Accordingly, this Court has encouraged trial courts to construe pretrial orders to limit the issues actually tried. Swift v. State Farm Mut. Automobile Ins. Co., 796 F.2d 120, 123 (5th Cir.1986). "If a claim or issue is omitted from the order, it is waived." Flannery v. Carroll, 676 F.2d 126, 129 (5th Cir.1982).[2]

[2-6] During examination by Harris' attorney Bump was asked whether he made a "conscious decision" not to apply his brakes after the collision with the Harris vehicle.

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[2]At oral argument appellants; counsel noted that the district judge's ruling on the seat belt instruction prevented counsel from arguing to the jury the relevancy of the seat belt evidence to the issue of Bump's negligence. Although the appellant did not assign this point as error, we note for the sake of completeness that counsel was not prohibited from arguing the seat belt evidence entirely. The district judge ruled that the evidence was relevant to the issue of Bump's control of the vehicle. The judge also ruled that while counsel would not be permitted to argue that a breach of duty to wear a seat belt caused the accident, counsel would be permitted to argue the evidence to underscore that Bump had earlier confessed to being thrown clear of the driver's seat.

Bump answered, "In my mind, all I could think about was straightening that truck up to keep from having a wreck again." When asked whether there was any reason why he could not have braked, he answered "no, no." The appellants argue that Bump admitted he made a conscious decision not to brake and that the district judge erred in refusing to grant motions for directed verdict and JNOV on the basis of this admission. The appellants also argue that the district judge erred in refusing to give an instruction that required the jury to find negligence if they found Bump failed to brake properly. Rulings on motions for directed verdict and for judgment notwithstanding the verdict are reviewed under the abuse of discretion standard. Ellis v. Chevron U.S.A., Inc., 650 F.2d 94, 96-97 (5th Cir.1981). This Court considers the entirety of the evidence, and there must be substantial evidence opposed to the motions in order for

the case to be submitted to the jury. Boeing Company v. Shipman, 411 F.2d 365, 374 (5th Cir.1969) (en banc). See also Melear v. Spears, 862 F.2d 1177, 1182 (5th Cir.1989). In addition, a trial court has substantial latitude in fashioning jury instructions and the charge will be deemed adequate if, considering the totality of the charge, the instructions are comprehensive, balanced, fundamentally accurate, and not likely to confuse or mislead the jury. Sommers Drug Stores Co. Employee Profit Sharing Trust v. Corrigan, 883 F.2d 345, 350 (5th Cir.1989). If an objection is raised against the failure to grant a requested instruction, the correctness of the proposed instruction must be shown as a threshold matter. Pierce v. Ramsey Winch Co., 753 F.2d 416, 425 (5th Cir.1985).

None of the cases cited by the appellants indicate that Mississippi courts give such weight to a failure to use brakes as to support a directed verdict or JNOV on that basis alone. See Moore v. Taggart, 233 Miss. 389, 102 So.2d 333 (1958); Nielson v. Miller, 259 So.2d 702 (Miss.1972). In Moore the Mississippi Supreme Court commented that due care requires an operator to use his emergency brake, "if need be", to avoid an accident. Moore, 102 So.2d at 338. Accordingly, the court held that a sudden emergency instruction which might have excused the defendant's "failure to use brakes" improperly assumed that both the foot brake and the emergency brake were defective, when the evidence suggested only that the foot brake was defective. Id. The court in Nielson similarly disapproved of a sudden emergency instruction in circumstances where the defendant did not explain why she did not use

her emergency brake. Nielson, 259 So.2d at 704-05. It is apparent that both of these cases deal with the propriety of a sudden emergency instruction; neither case requires a finding of negligence based solely on a failure to brake.

[7] Moreover, the record contains substantial evidence opposed to the appellants' motions for directed verdict and JNOV. Bump did not testify that he made a conscious decision" not to apply his brakes, but rather that he attempted to steer the truck in such a way as to avoid a second collision. He similarly testified that following the collision with the Harris vehicle his truck was veering to the left, that the steering would not turn back in the other direction, and that had he applied his brakes the truck might have jackknifed effectively blocking both lanes. It is clear the evidence presented a question of

negligence for the jury to resolve, and the fact that Bump did not brake following the collision with the Harris vehicle was not alone sufficient to take the matter from the jury.

Nor can we agree that the appellants were entitled to their proposed instruction on failure to brake. The Moore and Nielson cases discussed above do not give conclusive weight to failure to brake, and the appellants have brought no Mississippi case to the attention of this Court supporting an instruction which mandates a finding of negligence under these circumstances. The district judge was therefore correct in refusing the instruction.

[8] Battle, driver of the car following Bump, was called to testify for Bump and MTD. He testified that Bump was "in total control" of the truck until it was struck by the Harris vehicle.[3] The appellants argue that this

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[3]Battle answered affirmatively when asked by the district judge, "do you mean that he was

testimony constituted either a legal conclusion or an opinion on an ultimate issue. We review for abuse of discretion. Scheib v. Williams-McWilliams Co., 628 F.2d 509, 511 (5th Cir.1980).

Rule 701 of the Federal Rules of Evidence permits a non-expert to testify in the form of an inference providing the inference is "rationally based on the perception of the witness" and "helpful to a clear understanding of the witness' testimony of the determination of a fact in issue". Under Rule 704 testimony in the form of an inference is "not objectionable because it embraces an ultimate

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driving in a safe and prudent manner and at a safe rate of speed in the proper lane of travel?" Battle also described the left front wheel of the truck following the collosion and speculated that the condition of the wheel explained Bump's inability to steer. The appellants complain of this testimony on appeal, but because no timely objection was raised before the trial judge we do not pass on these points. Fed.R.Ev. 103(a)(1).

issue to be decided by the trier of fact." Three factors determine the admissibility of lay opinion testimony under Rule 701.

> First, the witness must have "personal knowledge of the facts from which the ...opinion is said to derive." Second, a "rational connection" must exist between the opinion and the facts upon which it is based.... Finally, "the opinion ...must be helpful, either in understanding the testimony or in determining a fact in issue."

Soden v. Freightliner Corp., 714 F.2d 498, 511 (5th Cir.1983)_ (quoting Lubbock Feed Lots, Inc. v. Iowa Beef Processors, 630 F.2d 250, 263 (5th Cir.1980)).

While it is doubtful Battle was reciting anything more than his observations, the testimony was clearly admissible as an inference of a lay witness. Battle had every opportunity to observe the truck's movement, the movement of a truck is rationally connected to the control of its driver, and

the testimony was helpful in allowing the jury to assess Bump's negligence. We find no abuse of discretion in allowing the testimony.

[9] The appellants were denied an instruction which placed the burden of proof on Bump to show that he traveled onto the opposing lane of traffic through no negligence of his own. The appellants argue that they were entitled to an instruction that put the burden of proving the affirmative defense of mechanical failure on the defendants. As noted above, the appellants must show the correctness of the proposed instruction as a threshold matter. Pierce, 753 F.2d at 425.

None of the cases cited by the appellants support the proposed instruction. In Nobles v. Unruh, 198 So.2d 245 (Miss.1967), the court held that a party who, in violation of the motor vehicle law, had entered another lane of traffic without ascertaining the safety of the move, "when either explained nor excused," was

negligent as a matter of law. Id. at 247. In Hinton v. McKee, 329 So.2d 519 (Miss.1976), the defendant's decedent had crossed the center line and collided with the plaintiff's vehicle. The court held that the defendant, who did not offer any proof to negate the negligence of the decedent but instead asserted an affirmative defense, had the burden of proving the affirmative defense by a preponderance of the evidence. Id. at 521. Neither of these cases indicate that a defendant has the burden to prove no negligence merely on a showing that the defendant crossed the center line.

The appellants nevertheless point out that an allegation of a sudden failure of the brakes was characterized as an affirmative defense in Bullock v. Sim Ramsey, Jr. Trucking Co., 207 So.2d 628 (Miss.1968). In Bullock the defendant admitted the plaintiffs

allegations but sought to avoid liability by urging the sudden failure of his brakes. Id. at 631.

Bump, however, did not raise an affirmative defense of sudden brake failure. The claims of the parties set forth in the Pretrial Order show that Bump and MTD did not accept the plaintiffs' factual allegations and plead sudden brake failure in avoidance. Instead, they opted during the course of trial to defend against the allegations of negligence. The charge submitted to the jury was entirely consistent with the defense, and properly put the burden of proving negligence on the appellants.

[10] The appellants contend that through interrogatories the defendants' accident reconstruction experts offered one theory of why the truck veered to the left, but four days before trial offered a different theory at deposition. The appellants argue that they

were surprised by the change in the theory and that the district judge erred in refusing to exclude the testimony of the experts at trial.

In response to interrogatories the defendants indicated that Dr. Roy Arnold and Dr. Henry Bass would testify that "the steering mechanism was disabled by the impact with the Harris LTD." In a supplementary response the defendants described the truck as "left front impaired." The statement of facts contained in the pretrial order stated that the Harris vehicle "str[uck] the left front wheel of Henry Bump's truck, turning the wheel in a northwesterly direction and disabling the steering gear of the truck." Dr. Bass later testified, however, that the steering mechanism itself was not disabled, but that wheels became bound when the Harris vehicle struck the left front of the truck. He agreed

that the words "steering mechanism" were imprecise but insisted that his conclusions remained the same.

We believe that any discrepancy in the theory is largely semantic, and accordingly conclude that the district judge did not abuse his discretion in admitting the testimony. See Woods v. International Harvester Co., 697 F.2d 635, 630-40 (5th Cir.1983).

The judgment is affirmed.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 88-4377

ROBINSON, et al

Plaintiffs-Appellants

v.

BUMP, et al

Defendants-Appellees

On Petition for Rehearing and
Suggestion for Rehearing En Banc
(March 21, 1990)

PER CURIAM:

The Petition for Rehearing is denied and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is denied.

ENTERED FOR THE COURT:

/s/ John M. Duhe'

UNITED STATES COURT OF APPEALS
FOR THE FIFTH DISTRICT

ROBINSON, et al	)	
	)	
Plaintiffs	)	CIVIL ACTION
	)	NO. 88-4377
	)	
BUMP, et al	)	MEMORANDUM
	)	OPINION
Defendants	)	

MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT AND, ALTERNATIVELY, FOR A NEW TRIAL AND FOR AN ADDITUR

By: Hon. Glen H. Davidson
United States District
Judge

Subsequent to a lengthy jury trial that resulted in a plaintiff's verdict agsint the defendant Willis C. Harris and a verdict in favor of the defendants MTD Products, Inc. and Henry H. Bump, the post trial motion as above captioned came on for consideration by the court. The court has carefully reviewed the motion and authorities in support thereof, as well as the response thereto, together with the court's trial notes. The court in

applying the standards pronounced in this circuit in Howell v. Gould, Inc., 800 F.2d 482 (5th Cir.1986) and Boeing v. Shipman, 411 F.2d 365 (5th Cir.1969) is of the opinion that the motion is not well taken.

This finding is based on the numerous rulings and opinions that the court has heretofore made in the record sub judice. The court notes that when the plaintiffs brought to the court's attention the fact that the word "and" was underlined in interrogatory No. 2 that the court underlined the word "and" in interrogatory No. 3 prior to submission of the case to the jury. Further, the court notes that it is without authority to grant an additur as an alternative to a new trial. Dimick v. Schiedt, 293 U. S. 474 (1935).

As to the remaining grounds set forth in the motion the court is of the opinion that the verdict of the jury was supported by the evidence and should not now be disturbed.

Accordingly, the motion for judgment notwithstanding the verdict and alternatively for a new trial and for an additur is overruled and denied.

ENTER: This 2nd day of May, 1988.

s/Glen H. Davidson
United States District Judge

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF MISSISSIPPI
DELTA DIVISION

ESTELLA HAYNES ROBINSON,
ADMINISTRATRIX OF THE
ESTATE OF WILLIE
ROBINSON, JR., DECEASED,
et al JUDGMENT IN A CIVIL CASE

V.

CASE NUMBER DC84-221-D-O
DC84-224-D-O
DC84-227-D-O
DC84-228-D-O
DC84-231-D-O

HENRY M. BUMP, MTD PRODUCTS, INC.,
and WILLIS C. HARRIS
JURY VERDICT. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

IT IS ORDERED AND ADJUDGED:

That the plaintiffs, Estate and Beneficiaries of Willie Robinson, Jr., Deceased, do have of and recover from the defendant, Willis C. Harris, the sum of $200,000.00, together with interest at the rate of 6.58% per annum from date until paid.

That the plaintiffs, Estate and Beneficiaries of Shirley Granberry, Deceased, do have of an recover from the defendant, Willis C. Harris, the sum of $150,000.00, together with interest at the rate of 6.58% per annum from date until paid.

That the plaintiffs, Estate and Beneficiaries of Shalanda Granberry, Deceased, do have of and recover from the defendant,

Willis C. Harris, the sum of $100,000.00, together with interest at the rate of 6.58% per annum from date until paid.

That the plaintiffs, Estate and Beneficiaries of Patricia Perkins, Deceased, do have of an recover from the defendant, Willis C. Harris, the sum of $130,000.00, together with interest at the rate of 6.58% per annum from date until paid.

That the plaintiff, Debra Ann Johnson, do have of and recover from the defendant, Willis C. Harris, the sum of $1,500,000.00, together with interest at the rate of 6.58% per annum from date until paid.

That the plaintiff, Detrick Granberry, do have of and recover from the defendant, Willis C. Harris, the sum of $250,000.00, together with interest at the rate of 6.58% per annum from date until paid.

That the claims stated by the plaintiffs herein against the defendants, Henry M. Bump and MTD Products, Inc., are DISMISSED with prejudice; said defendants shall go hence with their costs.

That the cross-plaintiff, MTD Products, Inc., do have of and recover from the cross-defendant, Willis C. Harris, the sum of $67,750.00, together with interest at the rate of 6.58% per annum from data until paid.

That the cross-plaintiff, Henry M. Bump, do have of and recover from the cross-defendant, Willis C. Harris, the sum of $1,764.75, together with interest at the rate of 6.58% per annum from date until paid.

That the costs herein are assessed to the defendant, Willis C. Harris.

February, 17, 1988
Date

NORMAN L. GILLESPIE
Clerk

/s/ Rosalee K. Ellixson
Courtroom Deputy Clerk

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF MISSISSIPPI
DELTA DIVISION

ROBINSON, et al

Plaintiffs-Appellants

CASE NUMBER DC84-22-D-O
DC84-224-D-O
DC84-227-D-O
DC84-228-D-O
DC84-231-D-O

v.

BUMP, et al

Defendants-Appellees

EXCERPT FROM TRIAL TRANSCRIPT
(February 8, 1988

[621] Gentlemen, the Court takes up at this time the matter of the admissibility of the seat belt evidence, and I really believe that in doing so the Court must address the appropriateness in the case sub judice of a negligence per se instruction premised on the -- I actually think we are talking about two different things, whether a negligence per se instruction in warranted in

the case sub judice and whether simply the evidence of the fact that the defendant Bump was not utilizing a seat belt on the occasion complained of.

The applicable Code of Federal Regulations is found in 49 CFR, Section 392.16. In examining the law that applies to the question presented in the case sub judice, the Court looks to the Mississippi case of Strong v. Freeman Truck Lines, Inc., 456 So.2d at page 698, 1984 Mississippi case, and to a case cited by the plaintiffs in their offer with their jury instructions, Wallace v. Ener, a Fifth Circuit case at 521 F.2d, page 215, Fifth Circuit, 1975, a diversity case construing Georgia law.

[622] This Freeman Truck Line case involved a situation where an interstate limited access highway traversed a municipality. The Mississippi statute concerning the parking of a motor vehicle on a

highway and the federal highway regulation are practically the same, wherein when a truck or car is disabled on a travelled highway, the driver, responsible person, must take certain safety measures, i.e. posting of flares, reflectors, flags, and so forth, behind that vehicle. The Mississippi Supreme Court in the Freeman case held that the accident occurred outside of a business district, although it was inside an incorporated area, but on the interstate highway, and that the jury should have been so instructed as a matter of law that the violation of that statute and federal regulation under those circumstances, in the opinion of the State Supreme Court, did constitute negligence per se.

The Georgia case is very similar, Wallace v. Ener, in that a motorcyclist struck the rear of a truck that was parked on a highway, on the traveled portion of the

highway. That case again involved the placing of flares and flags, and so forth, behind a truck.

Clearly in both of those cases the injured plaintiff or the plaintiff's decedent was a member of a class that clearly was protected by the enactment of the regulation or statute, and clearly the facts in both cases involved injuries and death resulting directly from the subject matter of the [623] statute or regulation.

In this Court's opinion, the Mississippi case of Haver v. Hinson, 385 So.2d at page 605, Mississippi, 1980, is very similar factually to the case sub judice insofar as the applicability of the regulation is concerned. In the Hinson case a lady was parked in a residential area conversing with certain residents. A child of the residence apparently crawled under the motor vehicle

while the lady was talking to them, and when she left the premises, of course, the child was run over and injured.

Now, the Mississippi statute provides what side of the road a motorist will park on, and in the Hinson case the car was parked on the wrong side of the road. But the State Supreme Court held that the plaintiff was not entitled to a negligence per se instruction in that the driver, the defendant driver, was parked on the wrong side of the street in violation of the Mississippi Code, 63-3-601. The State Supreme Court stated, "We disagree with the contention that the plaintiff is entitled to a negligence per se instruction because the violation of a safety statute constitutes negligence per se only where the plaintiff is a member of the class sought to be protected by the statute and the resulting harm is of the type sought to be prevented by passage of the statute."

In the Court's opinion, this CFR concerning seat belts [624] was enacted for the purpose of protecting the wearer of the seat belt, the driver of the vehicle. It is the Court's opinion that the evidence that the defendant Bump's truck was equipped with a seat belt assembly and that it was not being worn or utilized on the occasion complained of should come in just as the evidence came in in the Hinson case that the driver of the car was parked on the wrong side of the street. In no event should this evidence from the basis of a negligence per se instruction and in no event should the provisions of the Code of Federal Regulation provision come before this jury. The Court is of this opinion, number one, in that the pretrial order in this case does not under the section entitled "Questions of Law," the Code of Federal Regulation provision is not mentioned, the seat belt is not mentioned, the issue was not preserved. It's not

preserved anywhere in the pretrial order in any mixed question of law and fact. In fact, the CFR provision is not mentioned in the pretrial order. The Court is of the opinion that you cannot interject questions of law at this late stage in this proceeding.

Number two, the plaintiff has not shown that the plaintiffs in the case sub judice are members of any protected class envisioned by the enactment of the regulation and that the resulting harm is of the type sought to be prevented by passage of the regulation.

Now, gentlemen, that's the ruling of the Court. I will [625] permit the simple fact that the seat belt was not being utilized by Mr. Bump to come into evidence. We have gone into every detail as to where his hands were, his feet were, what equipment and

everything, but it will not -- in no event will it be the subject of a negligence per se instruction.

MR. DUNBAR: May I ask the Court to reconsider, please, your ruling that the fact of the lack of a seat belt should come in for this reason, Your Honor: If that's not a breach of duty, if Your Honor has held under the law that is no breach of duty which the plaintiffs can claim advantage of, then how could it even be relevant?

THE COURT: You say it's not relevant?

MR. DUNBAR: It's not relevant to an issue in the case. And what would the plaintiffs be allowed to argue if you let it in? It should be something that should be argued to the jury later. And it should be something that should be able to be built into an instruction of law as to duty later, if it's admissible, if the Court please.

THE COURT: Well, Mr. Dunbar, I catergorize the evidence as just like the Hinson case, which side of the street was the car parked on. Clearly that evidence came in, but it was --

MR. DUNBAR: I don't mean to interrupt Your Honor, but I think the fair inference is that if that case were retried the Court would say it shouldn't come in because it's [626] not a breach of duty, therefore it's not a relevant fact. It just has no bearing on the case. You see, we are prejudiced, Your Honor, just as if you gave a negligence per se instruction. If this comes in and they are permitted to argue somehow that we have breached some kind of duty because we should have had a seat belt on and if we'd had a seat belt on, they will argue such and such, but if we have breached no duty to start with, it's just not an issue in the case. It's just not relevant to an issue, and

I would ask Your Honor please to reconsider that aspect of your ruling, please, and if you would do that, I --

THE COURT: Yes. Very well.

Mr. Bostick?

MR. BOSTICK: Your Honor, I would respectfully say that it is relevant, it is material. We already have a conflict in the evidence, that is, Mr. Bump stating that at all times he remained in this seat, at all times he had his hands on the steering wheel fighting for control of the vehicle. Then we have the testimony of Officer Reed saying, He told me the day after this accident that he had been knocked completely out across the dog, and from that standpoint, Your Honor, the issue being control, that it's material as to whether or not he did in fact have his -- and it goes and it assists the jury into who they are going to believe as to whether or not he did in fact stay in his seat, did in fact,

[627] keep his hands on the steering wheel, or was he knocked across the doghouses as he told Officer Reed the following day. And from that standpoint I submit it is relevant, it is material.

MR. THOMPSON: Your Honor, I was going to point out to Your Honor the 403 rule, Rule 403, that the jury now has the testimony from Officer Reed as to what the defendant Bump told him that is misleading, the jury sitting there, and they probably didn't know --

THE COURT: The Court has ruled. The Court is going to read the stipulated fact to the jury, but I tell you now, it will not form the basis of any instruction on negligence per se, and no evidence of the CFR provision will go to this jury. That's the ruling of the Court.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF MISSISSIPPI
DELTA DIVISION

ROBINSON, et al

Plaintiffs-Appellants

v. CASE NUMBER: DC84-221-D-O
DC84-224-D-O
DC84-227-D-O
DC84-228-D-O
DC84-231-D-O

BUMP, et al

Defendants-Appellees

EXCERPT FROM TRIAL TRANSCRIPT
(FEBRUARY 16, 1988)

[1778] THE COURT: Now, No. 13 has to do with the seat belt. The Court has heretofore ruled on that. But for the record, I will make a brief statement for the record. The stipulation concerning the seat belts and the utilization or lack of utilization in the Bump-MTD truck was admitted by the court in light of the conflict in Officers Reed's testimony, that Mr. Bump, the day after the incident, told him that he was thrown from the driver's seat onto the doghouse or control

panel by the first collision, the Harris collision, and then at the trial Mr. Bump testified that he remained in the driver's seat [1779]and behind the steering wheel in the interlude between the Harris collision and the Robinson collision.

The Court is of the opinion that, pursuant to Rule 401 of the Federal Rules of Evidence, the testimony and stipulation was relevant to the issue of Bump's control of the vehicle on the occasion complained of.

Pursuant to the pronouncement of the Mississippi Supreme Court in Haver v. Hinson, 385 So. 2d, page 605, Mississippi, 1980, wherein the Court held that the violation of a safety regulation or statute constitutes negligence per se only where the plaintiff is a member of the class sought to be protected by the statute and the resulting harm is the type sought to be prevented by the passage of the statute or regulation would the failure to

utilize this equipment constitute negligence per se. Therefore, the Court is not and will not give a negligence per se instruction on the issue of Mr. Bump's failure to wear a seat belt.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF MISSISSIPPI
DELTA DIVISION

ROBINSON, et al

Plaintiffs-Appellants

CASE NUMBER: DC84-221-D-O
DC84-224-D-O
DC84-227-D-O
DC84-228-D-O
DC84-231-D-O

v.

BUMP, et al

Defendants-Appellees

EXCERPT FROM TRIAL TRANSCRIPT
(February 2, 1988)

THE COURT: Well, we know he's going to testify that he has the fuzz-buster, the seat belts --

MR. THOMPSON: Mirrors.

THE COURT: -- mirrors.

MR. BOSTICK: And a CB.

MR. THOMPSON: And a CB, for whatever that's worth. Lots of different equipment.

MR. DUNBAR: It's a matter for argument, Your Honor, as well as the fact -- correct me if I'm wrong -- I don't think these are issues in the pretrial order.

MR. THOMPSON: Well, it's certainly no surprise to anybody.

MR. DUNBAR: No.

MR. THOMPSON: You objected to the introduction of the fuzz-buster as a matter of not being relevant under the Rule 401. Objected to the use of the seat belts, too. It's just primarily argument whether or not it's relevant and admissible.

UNITED STATES DISTRICT COURT
IN THE NORTHERN DISTRICT OF MISSISSIPPI
DELTA DIVISION

ROBINSON, et al

Plaintiffs-Appellants

v.

CASE NUMBER: DC84-221-D-O
DC84-224-D-O
DC84-227-D-O
DC84-228-D-O
DC84-231-D-O

BUMP, et al

Defendants-Appellees

EXCERPTS FROM
PRE-TRIAL ORDER

(ENTERED AUGUST 5, 1987
FINAL PRE-TRIAL CONFERENCE FEBRUARY 4, 1986)

The following is a concise summary of the ultimate facts as claimed by:

a. All Plaintiffs: As to Liability:

On the night of November 2, 1984, Willie Robinson, Jr., was driving his automobile in a southerly direction on U.S. Highay 61,

approximately five miles South of Walls, Mississippi. He was driving slowly and carefully on the right hand side of the highway. Passengers in the Robinson automobile were: Debra Ann Johnson, Detrick Granberry, Patricia Ann Perkins, Shirley Granberry and Shalanda Granberry. Immediately preceding the automobile driven by Mr. Robinson was an automobile driven by Defendant, Willis Harris, also proceeding in a southerly direction. At the same time, Defendant, Henry Bump, was driving a tractor-trailer unit for Defendant, MTD Products, in a northerly direction along the highway.

Near such point there is a railroad overpass to the South and a bayou bridge North of the overpass. At or just beyond the crest of the overpass, an unidentified automobile began to pass the truck, which was gaining speed going down the overpass headed North. An automobile driven in a southerly direction

by Dewey Dickens was near the North end of the bridge approaching the truck and the passing car, ahead of the automobiles driven by Mr. Harris and Mr. Robinson, when he saw two sets of headlights running side by side, realized there was a problem and applied his brakes.

MR. Bump, the driver of the MTD Products truck, failed to keep a proper lookout to the rear. Just before the truck entered the bridge, Mr. Bump saw the lights of the Dickens automobile dip, looked in his mirror and saw the passing car at his side. He had seen the passing car earlier, when the passing car was South of the four lanes portion of the highway, South of the overpass, traveling fast. He had seen it in the rearview mirror really gaining on his truck prior to reaching the south foot of the overpass. He says as he crested the overpass he saw two cars behind him. He never looked to his rear again until he was entering the bridge.

Mr. Bump was operating the truck too fast for conditions and in excess of the fifty-five miles per hour speed limit. Mr. Bump claims when he first applied his brakes as his rig was entering the bridge, he had his hand on the gear shift, going from ninth gear, which covers forty-five to fifty-six miles per hour, to the tenth, or last, gear. However, the evidence indicates that the speed of the truck was even greater. The speed of the truck before the brakes were applied has been determined by Dr. Thomas Talbot, an accident reconstruction expert, to be at least sixty-five miles per hour. The passing car was finally able to pass the truck and re-enter the northbound lane, at or near the South end of the bridge.

Mr. Bump failed to have the truck under control. Mr. Dickens, who avoided the collision, stated that Mr. Bump was wrestling with the steering wheel, the trailer was

bouncing and swaying, swerving twelve to eighteen inches towards Dickens, about to take flight and he was afraid the truck was going to jack-knife and strike his automobile. It appears that skid marks made by the trailer proceed toward the southbound lane before the point of impact between the tractor and the Harris automobile.

Mr. Harris failed to have his automobile under control. Mr. Harris, on seeing the Dickens automobile nearly stop ahead of him and the truck approaching and going out of control, slammed on his brakes. In slamming on his brakes, his automobile skidded or drifted to the left. The tractor of the truck and the Harris automobile collided to the East of the center line, near the middle of the bridge, according to a gouge mark located by Officer Bobby Reed. The Harris automobile was spun around and driven backwards into the bridge abutment.

Mr. Bump failed to slow or stop the truck safely. The only skid marks of the truck North of the place where the collision with the Harris automobile occurred are front wheel tractor brakes, Mr. Bump should have been able to apply his brakes and stop before the collision with the Robinson automobile, but was unable to do so. It appears that he either did not fully apply the brakes, fearing a jack-knife, or not wearing seat belts, was thrown out of position in the collision with the Harris automobile.

The MTD unit proceeded in the northbound lane for a distance, then crossed into the southbound lane of traffic, occupied by the Robinson automobile and continued to come forward on this side of the road, directly into the path of the Robinson vehicle and struck this automobile headon with great force. It then took the Robinson car with it and struck the bridge abutment, near the North

end of the bridge, driving the Robinson automobile back along the guard rail pilings at the North end of the bridge and causing it to catch fire. The truck moved a distance of more than three hundred feet from the place where its brakes were first applied until it struck the Robinson automobile; it moved a distance of more than five hundred feet from the place where its brakes were applied until it finally came to rest.

Mr. Bump was not wearing seat belts and hit his head on the roof, cutting it so that forty stitches were required, in one of the collisions. The trailer brakes were adjusted by another company. Previous repairs for air leaks had been made.

Debra Ann Johnson and Detrick Granberry were seriously injured and Willie Robinson, Jr., Shirly Granberry, Patricia Ann Perkins

and Shalanda Granberry were killed in the accident. Witnesses heard groans come from the Robinson automobile.

....

The contested issues of fact are as follows:

1. Whether the sole proximate cause or a proximate contributing cause of the accident and resulting injuries and death of Plaintiffs Robinson, Perkins, Granberry, Johnson and Granberry was due to the negligence of Bump by (a) failing to keep a proper lookout to the rear; (b) operating his vehicle at an excessive speed under the circumstances then and there existing; (c) failing to maintain proper control; (d) failing to brake properly; (e) failing to yield one half of the roadways.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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v.

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Defendants-Appellees

EXCERPT FROM RECORD
(R. 497, FILED JANUARY 25, 1988)
MOTION IN LIMINE

COMES NOW Henry M. Bump and MTD Products, Inc., two of the Defendants in the above styled and numbered cause, through counsel, and respectfully move the Court in limine for an order excluding certain evidence from presentattion at trial, as follows:

.... All evidence regarding the fact that Defendant Henry M. Bump was not wearing seat belts at the time of the collision in

question. In support thereof Defendants state that this evidence is irrelevant and, if found to be relevant, is unfairly prejudicial pursuant to F.R.E. 403. Defendants further state that the failure to wear seat belts in the State of Mississippi is not evidence of negligence. See D. W. Boutwell Butane Co. v. Smith, 244 So.2d 11 (Miss. 1971)

PERTINENT TEXTS OF STATUTORY PROVISIONS

1. Federal Rules of Civil Procedure

Rule 16 which in pertinent part is as follows:

> .... (c) **Subjects to be discussed at Pre-trial conferences.** The participants at any conference under this rule may consider and take action with respect to (1) the formulation and simplification of the issues, including the elimination of frivolous claims or defenses;
>
> .... (3) the possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof, stipulations regarding the authenticity of documents, and advance rulings from the court on the admissibility of evidence;
>
> (8) the form and substance of the pretrial order;
>
> ....(e) **Pretrial Orders.** After any conference held pursuant to this rule, an order shall be entered reciting the action taken. This order shall control the subsequent course of the action unless modified by a subsequent order. The order following a final pretrial conference shall be modified only to prevent manifest injustice.

Fed. R. Civ. P. 16.

2. The seat belt regulation of the Federal Highway Administration reads as follows:

> A motor vehicle which has a seat belt assembly installed at the driver's seat shall not be driven unless the driver has properly restrained himself with the seat belt assembly.

49 C.F.R. § 392.16 (1984)